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No. 00-758

In the Supreme Court of the United States

UNITED STATES POSTAL SERVICE, PETITIONER

v.

MARIA A. GREGORY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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The Federal Circuit held that in imposing discipline against federal workers, "as a matter of law, consideration may not be given to prior disciplinary actions that are the subject of ongoing proceedings challenging their merits." Pet. App. 7a. In adopting that rule, the Federal Circuit improperly substituted its judgment for that of the MSPB and countless federal employers and overturned the longstanding administrative practice allowing consideration of prior disciplinary actions subject to pending grievances.

Rather than defend the Federal Circuit's decision on its terms, respondent attempts to recast that decision as establishing a "narrow rule" that affects "only *the MSPB*" (Resp. Br. 20), and leaves federal employers free to consider prior disciplinary actions in calibrating progressive discipline. The Federal Circuit's decision cannot bear that strained construction. The decision itself, the Federal Circuit's

subsequent treatment of the decision, and basic principles of administrative law all demonstrate that the Federal Circuit's ruling prevents the MSPB and federal employers alike from considering prior discipline subject to pending grievances. Moreover, even if the Federal Circuit had adopted respondent's "narrow rule," its decision still would conflict with longstanding administrative practice and the clear intent of Congress in enacting the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. 1101 *et seq.*

The bottom line remains that the Federal Circuit erred in vitiating a settled administrative practice that is not remotely "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 7703(c)(1). This Court should reverse the judgment below and remand to the Federal Circuit for consideration of the appropriate relief.

I. The Federal Circuit Did Not Adopt Respondent's Narrow Rule

Respondent's effort to prevail in this Court depends entirely on retooling the decision below. Respondent repeatedly asserts that the Federal Circuit's holding applies to "only *the MSPB*," Resp. Br. 20; see *id.* at 1, 15, 20, 23, 31, and insists that the court's holding does not preclude "*federal employers*" from relying on disciplinary actions subject to pending grievances in dealing with recidivist employees. *Id.* at 19. That argument is untenable.

First, and most fundamentally, respondent's narrow rule finds no support in what the Federal Circuit in fact said. Nothing in the Federal Circuit's categorical holding forbidding consideration of prior disciplinary actions subject to pending grievances purports to limit that holding to "*the MSPB*." To the contrary, the relief ordered by the Federal Circuit indicates that its holding governs *federal employers* as well as the MSPB. In remanding the case to the MSPB,

the Federal Circuit gave the Board the option to return the case "to the Postal Service to select a penalty *in light of the precise status of Ms. Gregory's prior disciplinary record.*" Pet. App. 7a-8a (emphasis added).

Subsequent Federal Circuit case law confirms that the decision below did not adopt respondent's narrow rule. In *Blank* v. *Department of the Army*, 247 F.3d 1225, 1230 (2001), the Federal Circuit declined to extend the "rule announced in *Gregory*" to prior disciplinary actions subject to pending EEOC proceedings. In refusing to extend *Gregory*, the *Blank* court explained: "If *an agency* is unable to consider prior disciplinary actions pending before the EEOC, *the agency* would be effectively prohibited from timely implementing progressive disciplinary measures." *Ibid.* (emphasis added). If the "rule announced in *Gregory*" governed "only *the MSPB*" (Resp. Br. 20), its application to prior discipline under review in the EEOC would not limit an agency's ability to implement progressive discipline.

Moreover, respondent's narrow rule runs counter to fundamental tenets of administrative law. It is well-settled that review of an agency action generally must be based on the record *before* the agency at the time of its decision. See, *e.g.*, *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 743-744 (1985); *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971). Under respondent's approach, however, federal employers could consider prior discipline subject to a pending grievance in deciding what discipline to impose, while *the MSPB* could not. To avoid that absurd result—that the Board must base its review on a narrower record than was before the primary decisionmaker—respondent suggests that the Board may consider the full record before the agency once pending grievances have run their course. But a reviewing tribunal generally need not wait for the administrative record to "ripen" based on events taking place long after the agency has made its decision, and the

Federal Circuit's decision cannot be fairly read to require that counterintuitive result.

Respondent's argument that the Federal Circuit adopted a narrow rule is further undercut by her arguments before the Federal Circuit and the MSPB. In the Federal Circuit, respondent argued that her rights were "violated when the government relied upon two unarbitrated cases *as a basis for discharge*." Pet. C.A. Br. 4 (emphasis added). Then, rather than asking the Federal Circuit to vacate the MSPB's decision and remand with instructions that her MSPB appeal be "continued to allow the grievance process concerning the earlier action to run its course" (Resp. Br. 23), respondent requested reversal of the MSPB's decision and that she "be returned to duty." Pet. C.A. Br. 6. Likewise, before the MSPB, respondent never asked the Board to stay her appeal until the pending grievances were resolved, and did not even challenge her prior discipline as erroneous. Pet. App. 37a.

"While it is true that a respondent may defend a judgment on alternative grounds, [this Court] generally do[es] not address arguments that were not the basis for the decision below." *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 379 n.5 (1996); see *Los Angeles Police Dep't* v. *United Reporting Publ'n Corp.*, 528 U.S. 32, 41 (1999); *Bragdon* v. *Abbott*, 524 U.S. 624, 638 (1998). Here, the Federal Circuit not only did not adopt respondent's narrow rule, but respondent asked for relief that is inconsistent with that rule and consistent with a "broad rule" governing both the MSPB and federal employers.[1]

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[1] Respondent's revisionist reading of the Federal Circuit's ruling is also contradicted by her own amici. For example, the American Federation of Government Employees, AFL-CIO (AFGE) "submits that the Federal Circuit's decision properly requires *agencies* to prove * * * the alleged misconduct in prior disciplinary actions that are pending before considering those actions in imposing a penalty in a subsequent adverse action." AFGE Br. 5 (emphasis added).

II. Even If The Federal Circuit Adopted Respondent's Narrow Rule, Its Decision Should Be Reversed

a. The narrow rule hypothesized by respondent is at odds with MSPB practice. For decades, the MSPB has held that agencies may rely on prior disciplinary actions that are subject to pending grievances in determining the penalty for repeated misconduct, but also has permitted employees collaterally to attack such actions before the MSPB when challenging progressive disciplinary measures. See U.S. Br. 21-23 & n.5; *Bolling* v. *Department of the Air Force*, 8 M.S.P.B. 658 (1981). Respondent allocates (at 31-32) scarcely two pages of her brief to discussing that deeply entrenched practice. There, respondent suggests (at 31) that the MSPB's case law does not address "whether *the MSPB itself* may rely * * * on prior disciplinary actions that are still the subject of pending grievance proceedings." Further, respondent hypothesizes that "[i]f the MSPB had confronted the precise issue here presented, it likely would have agreed with the Federal Circuit." *Ibid.*

But the Board's decision *in this case* establishes that the MSPB reviews the challenged disciplinary action under the familiar *Bolling* framework, see Pet. App. 36a-37a, rather than placing the appeal on hold until pending grievances "run [their] course" (Resp. Br. 23). Moreover, as respondent's own amici acknowledge (see Br. for Nat'l Treasury Employees Union (NTEU) 10), this case is by no means the first in which the MSPB has confronted this issue and applied *Bolling* in reviewing an employee's challenge to a removal based on a prior action that was "the subject of pending grievance or arbitration procedures" while the matter was before the MSPB. *Carr* v. *Department of the Air*

Force, 9 M.S.P.B. 714 (1982).[2] The Federal Circuit lacked a sufficient basis to override that administrative practice, whether it did so broadly or by adopting respondent's narrow rule.

b. Respondent's narrow rule also contravenes the CSRA. As noted, respondent's rule would force the MSPB to blind itself to key evidence relied upon by the agency in the decision under review. To avoid that absurd result, respondent suggests that the MSPB must "continue[]" appeals "to allow the grievance process concerning the earlier action to run its course." Resp. Br. 23. As this Court has observed, however, Congress designed the CSRA to *streamline* the administrative appeals process. See *United States* v. *Fausto*, 484 U.S. 439, 445 (1998) (citing S. Rep. No. 969, 95th Cong., 2d Sess. 9 (1978)). The Act accordingly provides that "[i]t shall be the duty of the Board * * * to expedite [its proceedings] to the extent practicable." 5 U.S.C. 7701(i)(4). Respondent's continuance procedure would require the MSPB to do just the opposite.

Respondent suggests (at 29) that "a later-initiated MSPB proceeding will rarely leap-frog an earlier-initiated grievance proceeding," because the "collective bargaining agreement here * * * calls for an arbitration decision in well under one year." That is wishful thinking. As this case illustrates, the grievance-arbitration process can and does take longer than a year to navigate. Indeed, as of April 2000, more than 126,000 grievances against the Postal Service (one of the Nation's largest single employers, with more than 700,000 employees) were awaiting arbitration by some 300 arbitrators. *Report of the USPS Comm'n on a Safe &*

[2] See also, *e.g.*, *Morgan* v. *Department of Def.*, 63 M.S.P.R. 58 (1994); *Taylor* v. *Department of Justice*, 60 M.S.P.R. 686 (1994); *Delgado* v. *Department of the Air Force*, 36 M.S.P.R. 685 (1988); *Freeman* v. *Department of Transp.*, 20 M.S.P.R. 290 (1984).

Secure Workplace 51 (Aug. 2000). More than 20,000 of those grievances were filed by the National Association of Letter Carriers, AFL-CIO (NALC) alone. *Ibid.*[3]

By contrast, MSPB's most recent performance report indicates that on average it took 89 days from the filing of an appeal to the initial decision by an administrative law judge, and 176 days for the full Board to review that decision, if requested by the employee. MSPB, *Fiscal Year 2000 Performance Report* 15-16 (Mar. 31, 2001). That report portrays a much different picture of MSPB efficiency than that painted (at 29) by respondent. Moreover, the MSPB's relative efficiency, compared with the delays that may ensue in the arbitration context, means that respondent's proposed "wait and see" role for the MSPB could substantially delay MSPB appeals and, thus, frustrate Congress's intent that those appeals be heard as expeditiously as practicable.

Neither federal employees nor employers would benefit from a regime in which the validity of major disciplinary actions remains shrouded in doubt for months if not years on end, due to the existence of pending grievances. In many cases, employees would be out of work while the MSPB waits for a grievance to run its course. Federal employers, for their part, might decline to impose progressive disciplinary measures because of the concern that the existence of

[3] Contrary to respondent's suggestion (at 29), the delay in processing the grievances in this case is by no means an aberration. See also, *e.g.*, *In re Arbitration Between USPS & NALC*, Case No. H94N-4H-D 97053759 (So. Regular Discipline Arb. Panel May 10, 2001) (Bajork, Arb.) (denial of grievance filed in September 1996 challenging employee's removal); *In re Arbitration Between USPS & NALC*, Case No. H94N-4H-D 98051824 (Regular Reg'l Arb. Panel Oct. 2, 1999) (Kyler, Arb.) (denial of grievance filed in November 1997 challenging employee's removal); *In re Arbitration Between USPS & NALC*, Case No. H94N-4H-D 96047665 (Regular Reg'l Arb. So. Panel Jan. 19, 1997) (Duda, Arb.) (denial of grievance filed in November 1995 challenging employee's removal).

pending grievances would unduly prolong the appeals process. Indeed, even respondent acknowledges (at 25) that her narrow rule might lead employers to "forfeit reliance on prior disciplinary actions still under review." When it enacted the CSRA, Congress sought to eliminate precisely such disincentives. Cf. *Fausto*, 484 U.S. at 445 (Under the former civil service system, the "general perception was that 'appeals processes were so lengthy and complicated that managers in the civil service often avoided taking disciplinary action' against employees even when it was clearly warranted.") (internal brackets omitted).[4]

c. While cavalierly dismissing the decades-old administrative practice, respondent argues that this Court should affirm because "[t]he narrow rule has long been applied in *arbitration*." Resp. Br. 20 (emphasis added); see *id.* at 2, 24-26. There are several problems with that argument, not the

[4] Respondent claims (at 29) that "the failure of respondent's grievances to proceed to arbitration is due entirely to the Postal Service's own purposeful delay," relying on her own account of non-record events. See also Resp. Br. 9-12. That claim is incorrect. The Postal Service was scheduling hearing dates for each of her grievances when, in December 1997, the union sought, and the Postal Service agreed, to hold the grievances in abeyance pending her MSPB appeal. After the MSPB's initial decision, an arbitration hearing was held in July 1999, during which one grievance was arbitrated. A second hearing for the remaining grievances was set for November 1999. But after the MSPB issued its final decision in October 1999, the union referred the remaining grievances to the national level and then, in February 2000, the union withdrew those grievances without prejudice. The union reasserted those grievances in March 2001, shortly after this Court granted certiorari. But the fact remains that respondent's grievances remained in limbo for a period of nearly 16 months due to the union's own actions. Moreover, if, as respondent now alleges, the Postal Service had sought improperly to delay the resolution of her grievances, the union (in which respondent was a steward) could have sought to compel arbitration by filing suit under 39 U.S.C. 1208, filing an unfair labor practice charge under 39 U.S.C. 1209(a), or filing a national-level grievance.

least of which is that respondent never raised it before the MSPB or the Federal Circuit. Indeed, although respondent asserted in her opposition to certiorari (at 19) that "arbitrators may not sustain disciplinary actions in reliance on unresolved priors," she never argued in that brief that the practice followed by some arbitrators was binding on the MSPB or controlling in this case, and for good reason.

To the extent that substantive rules differ between the MSPB and arbitration contexts, *Cornelius* v. *Nutt*, 472 U.S. 648 (1985), establishes that arbitration rules must yield. In *Cornelius*, this Court held that arbitrators must apply the same substantive law as the MSPB in reviewing agency disciplinary actions that could have been appealed to the Board. See *id.* at 660-662; see also *Westbrook* v. *Department of the Air Force*, 77 M.S.P.R. 149, 155 (1997); *Cockrell* v. *Department of the Air Force*, 58 M.S.P.R. 211, 217 (1993); NTEU Br. 4 (recognizing *Cornelius* rule).

To be sure, arbitrators may apply their own *procedural* rules in processing grievances. Because it bears directly on the reasonableness of an agency's disciplinary action and, indeed, may prove outcome determinative, the *Bolling* rule is substantive in nature and thus binding under *Cornelius*. But if the *Bolling* rule were procedural, it would simply be one of the many factors that a preference-eligible employee must take into account in deciding whether to appeal a major disciplinary action to the MSPB, or challenge it under a negotiated grievance procedure. Respondent's amici suggest that the arbitration rule is more favorable and so the MSPB must apply it to avoid disadvantaging preference eligible employees. NALC Br. 10-11. However, it is hard to see how preference eligible employees are disadvantaged by any difference in the arbitration and MSPB procedures when they can choose between challenging major discipline in the MSPB or by arbitration. Moreover, the choice that respondent confronts is reflected in the Postal Service's agreement

with the NALC (art. 16.9), which provides that when a preference-eligible employee elects to appeal to the MSPB, "the employee thereby waives access to any procedure under the Agreement beyond Step 3 of the grievance-arbitration procedure." Step 3 occurs while a grievance is still before the agency, prior to any arbitration.[5]

d. Respondent claims (at 26) that her narrow rule is more "[s]ensible" than the MSPB's practice, arguing that her rule is necessary to eliminate "strategic gamesmanship." That is precisely the sort of policy argument that Congress committed to the discretion of the MSPB. See U.S. Br. 17-18. The question for the courts is not whether one rule is more "sensible" than the other; rather, it is whether the rule applied by the MSPB is arbitrary and capricious, or otherwise contrary to law. Neither respondent nor her amici has come close to satisfying that threshold.

In any event, respondent's policy concerns (which were not advanced below) are misplaced. There is no reason for this Court to disregard the traditional presumption of administrative regularity (see U.S. Br. 36-37) and attribute illicit motives to federal employers. The *Bolling* framework has been in place for over two decades and none of the horribles identified by respondent (at 27) or her amici

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5 The NALC argues that the Federal Circuit's ruling is consistent with the Postal Reorganization Act (PRA), 39 U.S.C. 101 *et seq.*, claiming that "[t]he PRA allows application of federal civil service law to postal employee removal cases only to the extent not inconsistent with applicable collective bargaining agreements." NALC Br. 5 (citing 39 U.S.C. 1005(a)(1)(A)). Even if that were true in the case of the typical postal employee, the PRA expressly provides that in the case of a preference eligible employee such as respondent the pertinent provisions of the CSRA "shall apply * * * in the same manner and under the same conditions" as they do with respect to other employees covered by the CSRA. 39 U.S.C. 1005(a)(2); see 39 U.S.C. 1005(a)(4)(A). Respondent herself acknowledges (at 3) as much, which may explain why she did not rely on the PRA in the MSPB or the Federal Circuit.

(AFGE Br. 13) have materialized. Furthermore, any incentive that employers might have to "manipulate the system" (Resp. Br. 27) is already dealt with by *Bolling*, which permits employees collaterally to attack any prior disciplinary actions that remain subject to pending grievances. Federal labor laws may offer additional checks on any strategic behavior by federal employers. See note 4, *supra*.

At the same time, respondent simply ignores the other side of the equation. Preventing federal agencies, or the MSPB, from considering prior disciplinary actions subject to pending grievances creates an obvious incentive for recidivist employees (or their unions) to grieve virtually any disciplinary action, and then prolong the proceedings for as long as possible See U.S. Br. 36. Moreover, respondent's narrow rule could have the adverse effect of discouraging employers from relying on prior disciplinary actions in assessing the appropriate penalty for continuing misconduct, thus impeding employers' efforts to employ what all agree is a valuable human resource management tool—progressive discipline. See *id.* at 25-26 & n.7.

III. The Due Process Clause Does Not Demand Rejection Of The Settled Administrative Practice

The established administrative practice provides employees with more than adequate process to satisfy any constitutional or statutory command. See U.S. Br. 37-38. The Federal Circuit did not purport to rest its decision on due process grounds. Respondent likewise has not raised any constitutional argument. Instead, she argues that the many procedural protections afforded by the CSRA and the MSPB's rules "do not render the narrow rule unnecessary," Resp. Br. 34 (initial capitals omitted), and suggests that the existing administrative practice is "unfair[]." Respondent's amici go further and suggest that the settled administrative

practice is unconstitutional. See NALC Br. 8-10; AFGE Br. 6-10. Those arguments should be rejected.

With respect to even minor disciplinary actions, the CSRA guarantees employees notice, the right to representation, an opportunity to respond, and a written statement of the reasons for the disciplinary action. See 5 U.S.C. 7503(b), 7513(b). An employee who is subjected to a major disciplinary action is entitled to those protections, and to appeal the disciplinary action to the MSPB. 5 U.S.C. 7701; U.S. Br. 3-4. In the MSPB, the employer bears the burden of establishing that the adverse action at issue is supported by a preponderance of the evidence. 5 U.S.C. 7701(c)(1)(B). That pre- and post-deprivation process clearly exceeds any constitutional minimum.

The MSPB's *Bolling* rule provides employees with additional protection by allowing them to mount a collateral attack on prior discipline that provides a basis for the current action. See Resp. Br. 35 ("The *Bolling* rule does permit collateral attack of prior disciplines."). Respondent (at 35-36) and her amici (AFGE Br. 9) complain that *Bolling* calls for clear-error review of the prior action when the employee already has had some opportunity to challenge it. But no principle of due process entitles an employee to a de novo standard of collateral review, especially when the employee already has had an opportunity to mount a direct challenge to the prior action before the agency, and has a full opportunity before the MSPB to challenge (de novo) the disciplinary action relying on that prior action. The fact that a non-constitutionally mandated grievance to the prior discipline has not run its full course does not entitle the employee to a de novo standard of collateral review in the MSPB. Moreover, it can hardly be said that the *Bolling* framework for collateral review of prior discipline conflicts with the CSRA, when Congress chose not to provide for *any*

MSPB review of minor disciplinary actions. See U.S. Br. 3 n.1.

Respondent attacks (at 36) the clear-error standard on the ground that most agency actions have been upheld under that standard. But a reversal rate, without more, says little about the adequacy of a standard of review. Indeed, that track record could just as easily be viewed as a sign that prior disciplinary actions are generally well-founded and, thus, ordinarily *reliable* evidence. In any event, respondent is in a poor position to attack the adequacy of *Bolling*'s clear-error standard of collateral review. While she was advised that "she could present argument concerning whether the prior actions were clearly erroneous," respondent "did not set forth any such arguments" in the MSPB, Pet. App. 37a, let alone argue that the MSPB should have considered the validity of her prior disciplinary actions de novo. See U.S. Br. 23. Likewise, respondent's and amici's claim that *Bolling*'s clear-error collateral review conflicts with the CSRA's requirement that employers justify their actions by a preponderance of the evidence is flawed. Nothing in the *Bolling* rule diminishes the employer's burden of proving the major disciplinary action on direct review by a preponderance of the evidence.

Furthermore, as respondent acknowledges (at 37), the MSPB's rules establish a reopening procedure that offers an additional safeguard. See U.S. Br. 22-23. Respondent claims (at 37) that "the MSPB's ability to reopen its decisions provides no solace at all to employees in respondent's predicament." That is an unlikely argument coming from respondent. As respondent acknowledges (at 11), one of her prior actions was overturned by an arbitrator two months before the MSPB issued its final decision in her case. But respondent never presented that evidence to the MSPB while her appeal was pending before the Board, and never

sought to invoke the reopening procedure after her appeal became final. See U.S. Br. 38.

Respondent asserts that once the MSPB affirms a decision to remove an employee, some collective bargaining agreements provide that pending grievances on behalf of the discharged employee should be dismissed, which in turn may limit the utility of the reopening procedure. While it is true that the union's typical practice is to withdraw pending grievances once an agency's removal decision has been affirmed, the reopening procedure still provides significant protection. First, in all major disciplinary actions besides discharges, the reopening procedure provides a full opportunity to bring successful grievances to the attention of the Board, no matter how long the grievance process takes. Second, even for discharge actions, the MSPB rules including the reopening procedure allow employees to alert the Board of successful grievances up until the point that the removal becomes final (and grievances are dropped under a collective bargaining agreement). Thus, the MSPB rules provide protection during a significant interval. Respondent's complaint that that interval is too brief is difficult to reconcile with her claim that arbitration is more efficient than MSPB proceedings.

In any event, even where a discharged employee's collective bargaining agreement limits the effectiveness of the reopening procedure, the employee still has received more than adequate process in challenging her removal. The employee will have received all the procedural protections to which she is entitled under the CSRA in challenging minor disciplinary actions, an opportunity to challenge those actions collaterally under the *Bolling* framework, *and* an

opportunity to challenge the major disciplinary action on appeal in the MSPB and the Federal Circuit.[6]

Although respondent and her amici argue that additional process would be desirable, that is once again precisely the sort of policy consideration that Congress left to the MSPB to weigh against other considerations, such as the virtues of finality with respect to major employment actions and concerns that—as Congress recognized when it enacted the CSRA—overly elaborate procedural rules "often become the refuge of the incompetent employee." S. Rep. No. 969, *supra*, at 3; see U.S. Br. 15-16.

IV. The Question Of The Appropriate Remedy Is Better Left To The Federal Circuit On Remand

Respondent claims (at 39) that "[i]t is not entirely clear what the Postal Service expects from this Court" in the way of relief. To be clear, the Court should decide the question on which it granted certiorari, reverse the judgment below, and remand for further proceedings in the Federal Circuit.

If the Court reverses the Federal Circuit's decision and the erroneous rule on which it is grounded (Pet. App. 7a), then further proceedings would be necessary on remand to determine the appropriate relief. On the one hand, the Federal Circuit could conclude that the MSPB's decision should be affirmed, even though one of respondent's prior

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[6] Any objection to the union's practice of withdrawing grievances pending the MSPB's affirmance of an employee's discharge may be better directed to the collective bargaining arrangement than to the MSPB's rules. Under that agreement, the union mainains pre-separation grievances when the employee's separation is due to resignation, retirement, or death, but not when the employee is discharged for misconduct. See *In re Arbitration Between USPS & NALC*, Case No. H7N-5P-C 1132, at 7 (Nat'l Arb. Panel Mar. 26, 1990) (Mittenthal, Arb.). In any event, if the terms of respondent's collective bargaining agreement limit the effectiveness of the MSPB's procedural protections, the answer is certainly not to declare the MSPB's rules unconstitutional.

actions was set aside by an arbitrator while her appeal was pending before the Board. See U.S. Br. 38-39 & n.13. On the other hand, the Federal Circuit could decide to return this case to the MSPB for further consideration in light of this Court's ruling and the fact that one of respondent's priors was set aside. That determination should be left for the Federal Circuit on remand, after further briefing in light of this Court's decision. Cf., *e.g.*, *Shaw* v. *Murphy*, 121 S. Ct. 1475, 1481 (2001).[7]

As a last-ditch measure, respondent suggests (at 41-46) that the Court should dismiss the writ of certiorari. In doing so, respondent re-airs the same arguments that she made in opposition to certiorari. Those arguments were wrong at certiorari stage, see Cert. Reply Br. 5-9, and remain unavailing. This case presents an ideal vehicle to review the Federal Circuit's decision to scuttle the settled administrative practice. The MSPB relied on that practice in affirming respondent's removal. Pet. App. 36a-37a. The government relied on that practice in defending the MSPB's decision in the Federal Circuit. Gov't C.A. Br. 16; see Cert. Reply Br. 5-6 & n.3. Furthermore, the Federal Circuit's decision rejecting the settled administrative practice undeniably will affect the outcome in this case (see Resp. Br. 46), and, more to the point, will have an enormous effect on the efficiency of the federal civil service system.

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[7] Respondent suggests (at 2, 39) that the Postal Service has conceded that her "removal cannot stand in light of the arbitral decision overturning one of the three prior disciplinary actions in respondent's record." That is incorrect. See U.S. Br. 39 & n.13. Indeed, even respondent acknowledges (at 46) that her removal remains a possibility, though she claims that it is "extremely unlikely." The final determination cannot be made until this Court decides the question presented and, thus, the extent to which respondent's disciplinary record may be considered by the agency.

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For the foregoing reasons, and those in our opening brief, the judgment of the Federal Circuit should be reversed.

Respectfully submitted.

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